

No. 17507-8-9

United States Court of Appeals
For the Ninth Circuit

MAX KUNEY, JR. and CONSTANCE K. KUNEY, His Wife;
MAX J. KUNEY, SR., OLIVE R. KUNEY, *Appellants*,

vs.

WILLIAM E. FRANK, District Director of Internal
Revenue, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

PETITION OF APPELLANTS FOR REHEARING

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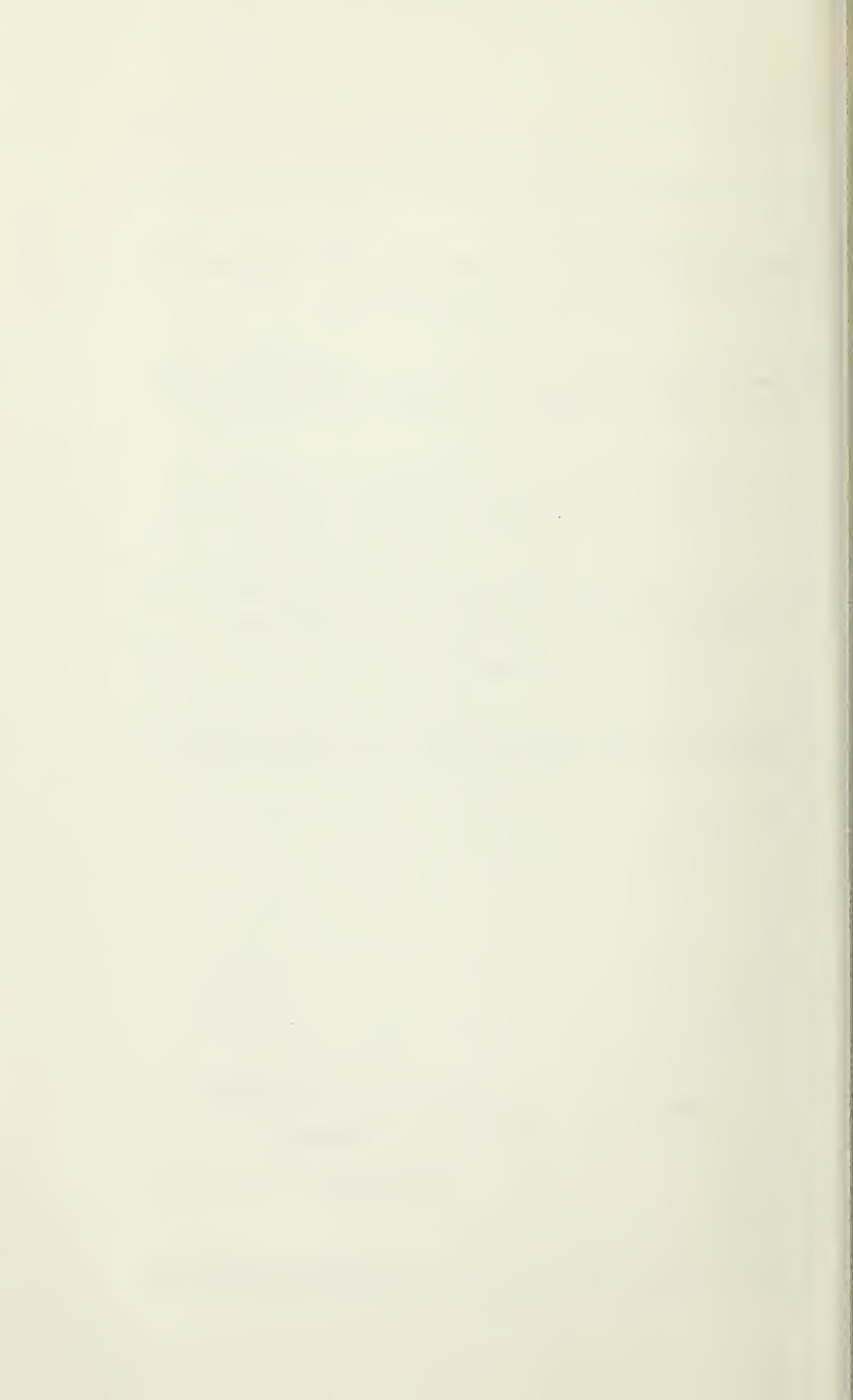
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Under the provisions of Rule 23 of this Court, the Appellants, Max Kuney, Jr. and Constance K. Kuney, his wife; Max J. Kuney, Sr., and Olive R. Kuney, through their counsel, respectfully petition for a rehearing *en banc* of the above causes (opinion filed in this Court on October 11, 1962) on the grounds set forth below:

Petitioners respectfully submit that this Court made the following errors:

I.

ERRORS IN STATEMENTS OF FACT

The Court misquoted the trust agreements by omission of the words emphasized below:

“Whenever any person under the age of thirty (30) years shall, under the provisions of this ar-

ticle, be entitled to receive or to have the use or application of any part of the net income of the Trust Estate, the Trustee may use and apply all or such part as to him shall seem best of such net income for or towards the maintenance, education, enjoyment, health and welfare of such person until *such person* attains the age of thirty (30) years, and the Trustee, during such time as *such person* is under the age of twenty-one (21) years, may either so use and apply the same himself or, in his discretion, pay the same or any part thereof to such person or to the guardian or parent or person having custody of such person *for the use and benefit of such person*, without any responsibility for the application thereof by such guardian, parent, or person having custody.” (R. 373, 374.)

The Court disregards the provision that income paid to the grantor must be applied solely for the benefit of the trust beneficiary and not otherwise and *not for the benefit of the grantor*.

The Court’s statement, “. . . changes in the surplus account necessarily changed the interests of the partners in the partnership” is incorrect. The fact is, changes in the surplus account, which at all times was in the corporation, had no effect whatever on the interest of the partners in the partnership nor, as the Court stated, “. . . in the share of income of each partner, including each trust.”

The Court stated that the Certified Public Accountant testified, “When he distributed income as directed by Kuney Senior, he did not distribute income in proportion to each partner’s capital investment in the partnership.” Petitioners can find no testimony to support

this statement. In fact, the record shows that Kuney Senior instructed and directed, in writing, that income be distributed in proportion to each partner's capital investment in the partnership and that he actually carried out the mathematical computations required to accomplish this. (Ex. G: JV 3, JV 4, JV 6, JV 7, JV 11).

There is no evidence to support the Court's statement that "the partnership assets were used for the credit of the corporation in its borrowings." Furthermore, the Court's statement is in error. (Reply Brief of the Appellants, pages 11-13.)

This Court stated "... no rent at all was paid on fully depreciated items ..." The undisputed and indisputable evidence is that the least rental ever paid on *any item* included all personal property taxes, maintenance and repair expenses and *all other costs of ownership*.

This Court further stated, "... this arrangement was questioned by an Internal Revenue Agent, ..." The evidence is that this arrangement was approved by the Appellate Staff of the Internal Revenue Service. (R. 281).

This Court states that "Kuney Senior testified that the beneficiaries of the trust were thus deprived of their interests in the corporation." There is no testimony that the trusts were ever deprived of anything in the sense of being dispossessed or bereaved. The testimony is: "... their money was invested elsewhere." (R.178). It should not be necessary to remind this Court that the question which Kuney Senior did not answer does not deserve an answer. (R. 172).

II.

ERRORS IN LEGAL CONCLUSIONS

In this case the jury found in favor of appellants and answered the crucial "good faith" special verdict question "Yes." The trial judge granted judgment *n.o.v.* This ruling can only be sustained if there was no substantial evidence to justify the verdict. Granting a judgment *n.o.v.* in this case after the special and general verdict invades the constitutional province of the jury.

In its concluding paragraph this Court states, "... the income is, as a matter of law, to be treated as ... the income of the donors." By this decision this Court has deprived the beneficiaries of all the income from property lawfully theirs. This result is unconscionable and violates the purpose of the statute.

Respectfully submitted,

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